

Message Text

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SUBJECT: US-EC MEETING ON OECD GOVERNMENT PROCUREMENT CODES

REF: A. GENEVA 3322 B. EC BRUSSELS 4206

1. SUMMARY: US OFFICIALS MET WITH EC COMMISSION OFFICIALS ON MAY 4 TO GET A CLEARER PICTURE OF THE EC'S THINKING ON ISSUES RAISED AT THE US-EC GOVERNMENT PROCUREMENT CONSULSTATIONS ON APRIL 26, (SEE REFTEL A). AS THE EC OFFICIALS WERE APPARENTLY WILLING TO CONSIDER APPROACHES THAT HAD BEEN REJECTED BY THEIR SUPERIORS, WE ARE REPORTING THEIR COMMENTS WITH ALL THE APPROPRIATE CAVEATS. THEY SUGGESTED THAT THE BEST TIME FGR THE PROPOSED US-EC TECHNICAL LEVEL CONSULTATIONS WOULD BE THE LAST WEEK IN JUNE OR THE FIRST WEEK IN JULY. END SUMMARY.

2. ON MAY 4 DOUGLAS NEWKIRK OF US MTN GENEVA AND JOEL SPIRO OF USEC MET WHT EC COMMISSION OFFICIALS JEAN-PIERRE DERISBOURG AND CHARLES STRUXIANO TO FOLLOW UP ON THE APRIL 26 US-EC CONSULATIONS ON THE PROPOSED OECD CODE ON GOVERNMENT PROCUREMENT. DURING THESE CONSULTATIONS, QUESTIONS
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HAD BEEN RAISED ON THE ISSUES OF BEST EFFORTS IN CON-

SECTION WITH PURCHASING ENTITIES NOT COVERED BY THE "FIRST LEVEL" OF OBLIGATIONS UNDER THE CODE, AND TRANSPARENCY. THE PURPOSE OF THIS INFORMAL MEETING WAS TO GET A CLEARER VIEW OF THE COMMISSION'S IDEAS ON THESE IMPORTANT SUBJECTS.

3. THE COMMISSION HAS PROPOSED THAT PURCHASING ENTITIES NOT INCLUDED IN THE EC DRAFT DIRECTIVE ON GOVERNMENT PROCUREMENT, SUCH AS RAILROADS AND POWER GENERATION AUTHORITIES, BE COVERED UNDER THE CODE BUT AT A LOWER LEVEL OF OBLIGATION THAN AGENCIES OF THE GOVERNMENT. COMMISSION OFFICIALS HAVE STATED THAT GOVERNMENTS WOULD HAVE AN OBLIGATION TO USE THEIR BEST EFFORTS TO ASSURE THAT THESE "SECOND-LEVEL" ENTITIES WOULD NOT DISCRIMINATE BETWEEN FOREIGN AND DOMESTIC SOURCES. WE ASKED THE COMMISSION OFFICIALS TO ELABORATE ON THEIR UNDERSTANDING OF WHAT BEST EFFORTS MEANS. (FOR EXAMPLE, HOW COULD COMPANIES OBTAIN REDRESS IF THEY FOUND THEMSELVES DISCRIMINATED AGAINST BY A NATIONAL ELECTRICITY COMPANY?) THE COMMISSION OFFICIALS ADMITTED THAT THEY DID NOT HAVE A GOOD ANSWER. HOWEVER, IN THE COURSE OF THE DISCUSSION THEY RESPONDED THAT INsofar AS THERE IS A RELATIONSHIP, OR LINK BETWEEN A SIGNATORY GOVERNMENT AND A PURCHASING ENTITY, THE SIGNATORY GOVERNMENT SHOULD USE THAT LINK TO INSURE NON-DISCRIMINATION. IF THE ENTITY IN QUESTION DID NOT PROVIDE AN ACCEPTABLE SYSTEM FOR HEARING PROCUREMENT COMPLAINTS, THE COMMISSION OFFICIALS, RECOGNIZING THE LEGAL PROBLEMS INVOLVED, THOUGHT THAT PERHAPS THE GOVERNMENT'S OWN SYSTEM OF ADMINISTRATIVE RELIEF COULD BE UTILIZED FOR CASES INVOLVING THESE NON-GOVERNMENTAL ENTITIES. THINKING OUT LOUD, DERISBOURG ALSO SUGGESTED THAT ARTICLE 34 OF THE DRAFT CODE COULD POSSIBLY BE REWRITTEN TO REQUIRE THAT ADMINISTRATIVE REMEDIES COVER ALLEGED DISCRIMINATION BY BOTH GOVERNMENT AGENCIES AND "SECOND LEVEL" ENTITIES. DERISBOURG SAID THAT THE EC'S OBJECTIVE IS TO INSURE NON-DISCRIMINATION AND IT WAS LOOKING FOR THE BEST WAY TO DO THIS.

4. WE ASKED THE COMMISSION OFFICIALS TO ELABORATE ON THEIR LIMITED OFFICIAL USE

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IDEAS FOR TRANSPARENCY. THE COMMISSION OFFICIALS ACCEPTED THE US POSITION THAT TRANSPARENCY WAS AN ESSENTIAL ELEMENT OF THE CODE AND THAT EX-POST PUBLICITY WAS THE BEST WAY TO ACHIEVE TRANSPARENCY. HOWEVER, SOME MEMBER STATES WOULD NOT ACCEPT THIS. INTERESTINGLY, STRUXIANO POINTED OUT THAT THERE IS A DRAFT LAW IN BELGIUM CALLING FOR THE PUBLIC OPENING OF BIDS ON ALL GOVERNMENT PROCUREMENT. THERE IS ALSO PUBLIC OPENING OF BIDS IN GERMANY FOR "OPEN"

TENDERS. THE CURRENT PRACTICE OF THE MEMBER STATES IS HOWEVER, FOR COMPLAINANTS TO BRING CASES INTO ADMINISTRATIVE COURTS WHICH INQUIRE INTO THE FACTS. WHAT TRANSPARENCY THERE IS RESULTS FROM THE CUMBERSOME RESORT TO THE COURTS TO OBTAIN INFORMATION FROM THE GOVERNMENT AGENCY BEING CHALLENGED. THE COMMISSION OFFICIALS, SPEAKING PERSONALLY AND IN AN EXPLORATORY FASHION SAID THAT SHORT OF EX-POST PUBLICITY, WHICH THE US WAS SEEKING, OTHER AVENUES FOR CREATING TRANSPARENCY WERE: (A) THE PUBLIC OPENING OF BIDS (B) A STRENGTHENING OF ARTICLE 33 OF THE CODE TO OBLIGE SIGNATORY STATES TO MAKE INFORMATION AVAILABLE TO LOSING BIDDERS, AND (C) DETAILED STATISTICS ON A YEARLY OR BI-YEARLY BASIS TO ACT AS A CONTROL. DERISBOURG, REMARKED THAT HE, PERSONALLY, DID NOT SEE TRANSPARENCY AS INSURMOUNTABLE PROBLEM AND SAID THAT THE COMMISSION HAS AN OPEN MIND ON THE SUBJECT. REPEATING WHAT COMMISSION OFFICIALS HAD SAID AT THE APRIL 26 CONSULTATIONS, HE STATED THAT THE COMMISSION WOULD BE ABLE TO ASK FOR MORE FROM THE MEMBER STATES ON TRANSPARENCY IF THE US WOULD BE WILLING TO GIVE MORE ON COVERAGE.

5. COMMENT: DERISBOURG, WHO WAS SPEAKING PERSONALLY, WAS OBVIOUSLY MUCH MORE FORTHCOMING IN HIS TREATMENT OF TRANSPARENCY THAN WERE EITHER GALLAGHER OR BRAUN AT THE APRIL 26 CONSULTATIONS, (SEE REFTEL A PARAS 5-9), WE WOULD CONSIDER THEIR STATEMENTS AS THE AUTHORITATIVE EC POSITIONS AT THIS TIME. NEVERTHELESS, DERISBOURG'S APPROACH-- WHICH WE CAUTION IS NOT THE EC'S POSITION-- SUGGESTS THAT THE MEMBER STATES MAY NOT BE AS IMMUTABLY WED TO THE PRINCIPLE OF NON-DISCLOSURE OF INFORMATION TO PRIVATE FIRMS AS HIGHER-LEVEL OFFICIALS WOULD HAVE HAD US BELIEVE. END COMMENT.
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6. DERISBOURG SAID THAT HE WOULD BE MEETING WITH THE 113 COMMITTEE ON MAY 13 TO REPORT ON THE US-EC CONSULTATIONS AND TO GO OVER THE ISSUES THAT HAD BEEN RAISED. IN MID-JUNE HE EXPECTS TO MEET WITH MEMBER STATES EXPERTS, WHO, IN THE MEANTIME, WILL HOPEFULLY HAVE THOUGHT ABOUT THE ISSUES. GIVEN THIS SCHEDULE DERISBOURG NOW BELIEVES THE BEST TIME FOR THE US-EC TECHNICAL CONSULTATIONS AGREED UPON AT THE APRIL 26 CONSULTATIONS WOULD BE DURING THE LAST WEEK IN JUNE OR THE FIRST WEEK IN JULY.

7. DERISBOURG SAID THAT THE TECHNICAL-LEVEL MEETING SHOULD INCLUDE TRANSPARENCY, STATISTICS, AND A LISTING OF ENTITIES COVERED UNDER THE "FIRST LEVEL" OF OBLIGATIONS.

HE CHARACTERIZED THIS LIST, ON THE PART OF THE EC, AS A
"NEGOTIATING LIST" AND NOT THE EC'S FINAL POSITION. HE
SAID HE HOPED THE U.S. WOULD BE ABLE TO TABLE A SIMILAR
LIST.HINTON

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